



DEPARTMENT OF HOMELAND SECURITY

8 CFR Part 208

[CIS No. 2741-23; DHS Docket No. USCIS-2020-0017]

RIN 1615-AC59

Asylum Interview Interpreter Requirement Modification Due to COVID-19

AGENCY: U.S. Citizenship and Immigration Services (USCIS), Department of Homeland Security (DHS).

ACTION: Temporary final rule; extension.

SUMMARY: The Department of Homeland Security (DHS) is extending, for a fourth time, the effective date (for 180 days) of its temporary final rule that modified certain regulatory requirements to help ensure that USCIS may continue with affirmative asylum adjudications during the COVID-19 pandemic.

DATES: This temporary final rule is effective from March 16, 2023 through September 12, 2023. As of March 16, 2023, the expiration date of the temporary final rule published at 85 FR 59655 (Sept. 23, 2020), which was extended at 86 FR 15072 (Mar. 22, 2021), at 86 FR 51781 (Sept. 17, 2021), and at 87 FR 14757 (Mar. 16, 2022), is further extended from March 16, 2023 through September 12, 2023.

FOR FURTHER INFORMATION CONTACT: Rená Cutlip-Mason, Chief, Division of Humanitarian Affairs, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 5900 Capital Gateway Drive, Camp Springs, MD 20588-0009; telephone (240) 721-3000 (not a toll-free call).

Individuals with hearing or speech impairments may access the telephone numbers above via TTY by calling the toll-free Federal Information Relay Service at 1-877-889-5627 (TTY/TDD).

SUPPLEMENTARY INFORMATION:

I. Legal Authority to Issue this Rule and other Background

A. Legal Authority

The Secretary of Homeland Security (Secretary) takes this action pursuant to his authorities concerning asylum determinations. The Homeland Security Act of 2002 (HSA), Public Law 107-296, as amended, transferred many functions related to the execution of Federal immigration law to the newly created DHS. The HSA amended the Immigration and Nationality Act (INA or the Act), charging the Secretary “with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens,” INA 103(a)(1), 8 U.S.C. 1103(a)(1), and granting the Secretary the power to take all actions “necessary for carrying out” the immigration laws, including the INA, *id.* 1103(a)(3). The HSA also transferred to DHS responsibility for affirmative asylum applications made outside the removal context. HSA 451(b)(3); 6 U.S.C. 271(b)(3) (providing for the transfer of adjudication of asylum and refugee applications from the Commissioner of Immigration and Naturalization to the Director of the Bureau of Citizenship and Immigration Services, now USCIS). USCIS asylum officers determine, in the first instance, whether a noncitizen’s¹ affirmative asylum application should be granted. *See* 8 CFR 208.4(b), 208.9. Generally, the Department of Justice Executive Office for Immigration Review adjudicates asylum applications filed by noncitizens who are in removal proceedings. *See* INA 103(g), 240; 8 U.S.C. 1103(g), 1229a.

B. Legal Framework for Asylum

Asylum is a discretionary benefit that generally can be granted to eligible noncitizens who are physically present or who arrive in the United States, irrespective of their status, subject to the requirements in section 208 of the INA, 8 U.S.C. 1158, and implementing regulations, *see* 8 CFR parts 208, 1208.

¹ For purposes of the discussion in this preamble, DHS uses the term “noncitizen” colloquially to be synonymous with the term “alien” as it is used in the INA. *See* INA 101(a)(3), 8 U.S.C. 1101(a)(3); *Barton v. Barr*, 140 S. Ct. 1442, 1446 n.2 (2020) (“This opinion uses the term “noncitizen” as equivalent to the statutory term “alien.” *See* 8 U.S.C. 1101(a)(3)”). DHS also uses the term “individuals.”

Section 208(d)(5) of the INA, 8 U.S.C. 1158(d)(5), imposes several mandates and procedural requirements for the consideration of asylum applications. Congress also specified that the Attorney General and Secretary of Homeland Security “may provide by regulation for any other conditions or limitations on the consideration of an application for asylum,” so long as those conditions or limitations are “not inconsistent with this chapter.” INA 208(d)(5)(B), 8 U.S.C. 1158(d)(5)(B). Thus, the current statutory framework leaves the Attorney General (and, after the HSA, also the Secretary) significant discretion to regulate consideration of asylum applications. USCIS regulations promulgated under this authority set agency procedures for asylum interviews and require that applicants unable to communicate in English “must provide, at no expense to the USCIS, a competent interpreter fluent in both English and the applicant’s native language or any other language in which the applicant is fluent.” 8 CFR 208.9(g)(1). This requirement means that all asylum applicants who cannot communicate in English must bring an interpreter to their interview. However, doing so, as required by the regulation, has posed a serious health risk because of the COVID-19 pandemic.

Accordingly, this temporary final rule extends the rule published at 85 FR 59655, for a fourth time, to continue to mitigate the spread of COVID-19 by seeking to slow the transmission and spread of the disease during asylum interviews before USCIS asylum officers while the COVID-19 national emergency and public health emergency (PHE) are still in effect. On January 30, 2023, the Administration announced its plan to extend the emergency declarations to May 11, 2023, and then end both emergencies on that date.² Consistent with that announcement, President Biden has extended the COVID-19 national emergency and announced that he anticipates terminating it on May 11, 2023.³ Likewise, the Department of Health and Human Services (HHS) has extended the PHE⁴ and stated that it is planning for the PHE to end on May

² Statement of Administration Policy (Jan. 30, 2023), <https://www.whitehouse.gov/wp-content/uploads/2023/01/SAP-H.R.-382-H.J.-Res.-7.pdf> (last visited Mar. 2, 2023).

³ Notice on the Continuation of the National Emergency Concerning the Coronavirus Disease 2019 (COVID-19) Pandemic, 88 FR 9385 (Feb. 14, 2023).

⁴ Department of Health and Human Services (HHS), Renewal of Determination that a Public Health Emergency Exists (Feb. 9, 2023), <https://aspr.hhs.gov/legal/PHE/Pages/COVID19-9Feb2023.aspx> (last visited Feb. 27, 2023).

11, 2023.⁵ The fourth extension of this temporary final rule provides some additional time following the expiration of the national and public health emergencies to allow USCIS to properly operationalize the return to the requirement that asylum applicants provide interpreters at their asylum interviews while also giving sufficient notice to the public of the expiration of this temporary final rule and reversion to past practice. To that end, this temporary final rule will extend for 180 days the requirement that allows noncitizens to use USCIS-provided interpreters during affirmative asylum interviews in certain instances. This temporary final rule also provides that, while the rule is in effect, if a USCIS interpreter is unavailable, USCIS will either reschedule the interview and attribute the interview delay to USCIS for the purposes of employment authorization under 8 CFR 208.7, or USCIS may, in its discretion, allow the applicant to provide an interpreter.

C. The COVID-19 Pandemic

On January 31, 2020, the Secretary of Health and Human Services declared a public health emergency under section 319 of the Public Health Service Act (42 U.S.C. 247d), in response to COVID-19, which is caused by SARS-CoV-2.⁶ On March 13, 2020, the President declared a National Emergency concerning the COVID-19 pandemic.⁷ As of February 1, 2023, there have been over 753 million confirmed cases of COVID-19 identified globally, resulting in more than 6.8 million deaths.⁸ Approximately 100,941,827 cases have been identified in the United States, with about 287,580 new cases identified during the week of January 23, 2023, and approximately 1,097,246 reported deaths due to the disease.⁹ A more detailed background

⁵ HHS, COVID-19 Public Health Emergency (PHE), <https://www.hhs.gov/coronavirus/covid-19-public-health-emergency/index.html> (last visited Mar. 2, 2023).

⁶ Department of Health and Human Services (HHS), Determination that a Public Health Emergency Exists (Jan. 31, 2020), <https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx> (last visited Jan. 12, 2023).

⁷ Proclamation 9994 of March 13, 2020, Declaring a National Emergency Concerning the Coronavirus Disease (COVID-19) Outbreak, 85 FR 15337 (Mar. 18, 2020).

⁸ WHO Coronavirus (COVID-19) Dashboard (updated Feb. 1 2023), <https://covid19.who.int/> (last visited Feb. 1, 2023).

⁹ *Id.*

discussion of the COVID-19 pandemic is found in the original temporary final rule, as well as in the first and second extensions of the rule, and USCIS incorporates the discussions of the pandemic into this extension. *See* 85 FR 59655 (Sept. 23, 2020); 86 FR 15072 (Mar. 22, 2021); 86 FR 51781 (Sept. 17, 2021).

Since publication of the original temporary final rule, variants of the virus that causes COVID-19 have been reported in the United States.¹⁰ Following the first COVID-19 Omicron variant case reported in the United States, on December 1, 2021, there was a rapid increase in infections and hospitalizations with multiple large clusters of outbreaks that peaked in mid-January 2022.¹¹ Although vaccines are now widely accessible, there is wide disparity in the percentages of who have received updated boosters.¹² Indeed, ongoing research demonstrates that while the effectiveness of authorized and approved COVID-19 vaccines against death, serious disease, and hospitalization remains high, their effectiveness against milder symptomatic disease wanes over time, and thus CDC guidance states that eligible individuals should receive COVID-19 vaccine booster shots after certain periods of time.¹³ CDC reports also show that

¹⁰ Centers for Disease Control and Prevention (CDC), SARS-CoV-2 Variant Classifications and Definitions (updated Apr. 26, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/variants/variant-classifications.html> (last visited Jan. 12, 2023).

¹¹ CDC, Rapid Increase of Omicron Variant Infections in the United States: Management of Healthcare Personnel with SARS-CoV-2 Infection or Exposure (Dec. 24, 2021), https://emergency.cdc.gov/han/2021/pdf/CDC_HAN_460.pdf (last visited Jan. 12, 2023); CDC, Potential Rapid Increase of Omicron Variant Infections in the United States (updated Dec. 20, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/science/forecasting/mathematical-modeling-outbreak.html> (last visited Jan. 12, 2023); CDC, COVID Data Tracker – Trends in Number of COVID-19 Cases and Deaths in the U.S. Reported to CDC, by State/Territory (updated Dec. 28, 2022), https://covid.cdc.gov/covid-data-tracker/#trends_dailycases (last visited Jan. 12, 2023); CDC, COVID Data Tracker: New Admissions of Patients with Confirmed COVID-19 Per 100,000 Population by Age Group, United States (updated Jan. 24, 2023), <https://covid.cdc.gov/covid-data-tracker/#new-hospital-admissions> (last visited Jan. 25, 2023).

¹² CDC, COVID Data Tracker – COVID-19 Vaccinations in the United States (updated Jan. 26, 2023), https://covid.cdc.gov/covid-data-tracker/#vaccinations_vacc-total-admin-rate-total (last visited Feb. 1, 2023).

¹³ CDC, Stay Up to Date with Vaccines (updated Jan. 9, 2023), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/stay-up-to-date.html> (last visited Jan. 12, 2023); FDA, COVID-19 Frequently Asked Questions (updated Dec. 8, 2022), <https://www.fda.gov/emergency-preparedness-and-response/coronavirus-disease-2019-covid-19/covid-19-frequently-asked-questions> (last visited Jan. 12, 2023); CDC, Waning 2-Dose and 3-Dose Effectiveness of mRNA Vaccines Against COVID-19–Associated Emergency Department and Urgent Care Encounters and Hospitalizations Among Adults During Periods of Delta and Omicron Variant Predominance — VISION Network, 10 States, August 2021–January 2022, Feb. 11, 2022, <https://www.cdc.gov/mmwr/volumes/71/wr/mm7107e2.htm> (last visited: March 8, 2023).

individuals who are unvaccinated have a greater risk of testing positive for COVID-19 and a greater risk of dying from COVID-19 than individuals who are fully vaccinated.¹⁴ While vaccines offer protection against variants, Centers for Disease Control and Prevention (CDC) data from January 2023 indicated that an Omicron subvariant, XBB.1.5, had quickly become a higher percentage of total COVID-19 cases in the United States, accounting for 61.3 percent of new cases.¹⁵ This subvariant only accounted for approximately 10 percent of new cases in early December 2022.¹⁶ Even with the emergence of this new variant, the number of COVID-19 infections and hospitalizations in the United States has greatly decreased since the peak in mid-January 2022.¹⁷

II. Purpose of this Temporary Final Rule

USCIS continues its efforts to protect the health and safety of its employees and the public by requiring all federal employees, on-site contractors, and visitors to follow local USCIS guidance on physical distancing and workplace protection consistent with updated Federal guidance.¹⁸

USCIS conducted 32,012 total asylum interviews between September 23, 2020 and March 7, 2022. While maintaining public safety measures pursuant to its response to

¹⁴ CDC, Rate of COVID-19 Cases and Deaths by Vaccination Status, <https://covid.cdc.gov/covid-data-tracker/#rates-by-vaccine-status> (last visited Jan. 12, 2023).

¹⁵ CDC, COVID Data Tracker-Variant Proportions (updated Jan. 28, 2023), <https://covid.cdc.gov/covid-data-tracker/#variant-proportions> (last visited Feb. 1, 2023); Aliza Rozen, What You Need to Know About XBB.1.5, the Latest Omicron Variant, Johns Hopkins Bloomberg School of Public Health (Jan. 6, 2023), <https://publichealth.jhu.edu/2023/what-you-need-to-know-about-xbb15-the-latest-omicron-variant> (last visited Jan. 12, 2023); Early Estimates of Bivalent mRNA Booster Dose Vaccine Effectiveness in Preventing Symptomatic SARS-CoV-2 Infection Attributable to Omicron BA.5– and XBB/XBB.1.5–Related Sublineages Among Immunocompetent Adults — Increasing Community Access to Testing Program, United States, December 2022–January 2023 (updated Feb. 3, 2023), <https://www.cdc.gov/mmwr/volumes/72/wr/mm7205e1.htm> (last visited: March 6, 2023).

¹⁶ *Id.*

¹⁷ CDC, COVID Data Tracker: New Admissions of Patients with Confirmed COVID-19 Per 100,000 Population by Age Group, United States (updated Jan. 24, 2023), <https://covid.cdc.gov/covid-data-tracker/#new-hospital-admissions> (last visited Jan. 25, 2023).

¹⁸ USCIS Response to COVID-19 (updated Oct. 24, 2022), <https://www.uscis.gov/about-us/uscis-response-to-covid-19> (last visited Jan. 12, 2023).

COVID-19¹⁹, USCIS simultaneously began increasing its affirmative asylum interviews in order to best serve the public. Between March 7, 2022 and January 24, 2023, USCIS conducted an additional 27,405 asylum interviews. The original temporary final rule, implemented on September 23, 2020, and its extensions implemented on March 22, 2021, September 20, 2021, and March 16, 2022, as well as other noted public safety measures, have helped mitigate the impact of COVID-19 and have been effective in keeping the USCIS workforce and the public safe. As of September 17, 2022, there have been 6,807 confirmed cases of COVID-19 among USCIS employees and contractors.

DHS has determined that it is in the best interest of the public and USCIS employees and contractors to extend the temporary final rule for 180 days. This period includes the time until May 11, 2023, while the emergency declarations remain in effect, and a period thereafter to allow USCIS a sufficient period to properly operationalize the return to the requirement that asylum applicants provide interpreters at their asylum interviews. Providing for a 180-day extension also gives sufficient notice to the public of the expiration of this temporary final rule and reversion to past practice.

Under this fourth extension, USCIS will continue requiring asylum applicants who are unable to proceed with the interview in English to use government-provided telephonic contract interpreters if the applicants speak one of the 47 languages found on the Required Languages for Interpreter Services Blanket Purchase Agreement/U.S. General Services Administration Language Schedule (GSA Schedule). If the applicant does not speak a language on the GSA Schedule or elects to speak a language that is not on the GSA Schedule, the applicant will be required to bring their own interpreter to the interview who is fluent in English and the elected language not on the GSA schedule. In the second extension of the temporary final rule, published at 85 FR 59655, DHS also amended 8 CFR 208.9(h)(1) by allowing, in USCIS'

¹⁹ *See id.*

discretion, an applicant for asylum to provide an interpreter when a USCIS interpreter is unavailable. *See* 86 FR 51781. Specifically, if a USCIS interpreter is unavailable, USCIS will either reschedule the interview and attribute the interview delay to USCIS for the purposes of employment authorization pursuant to 8 CFR 208.7, or USCIS may, in its discretion, allow the applicant to provide an interpreter.

DHS incorporates into this fourth extension, the justifications from the original temporary final rule and all subsequent extensions. The measures implemented since the original temporary final rule to protect employees, asylum applicants, and other members of the public, continue to be a priority for USCIS. Additionally, the modification to the second extension (i.e., USCIS exercising discretion to allow an asylum applicant to bring an interpreter to the interview if a contract interpreter is unavailable), will remain in place. The modification has given USCIS flexibility to plan ahead in the limited circumstances when a contract interpreter is expected to be unavailable for an asylum interview, reducing the likelihood of canceled interviews and unused office space. This fourth extension also incorporates the discussions on the overall benefits of providing telephonic contract interpreters in reducing the risk of contracting COVID-19 for applicants, attorneys, interpreters, and USCIS employees, from the original temporary final rule and all extensions.

III. Discussion of Regulatory Change: 8 CFR 208.9(h)²⁰

DHS has determined that there are reasonable grounds for considering potential exposure to SARS-CoV-2, including any emerging variants, as a public health concern and that these grounds are sufficient to extend the temporary final rule modifying the interpreter requirements for asylum applicants in order to lower the number of in-person attendees at asylum interviews.

²⁰ The interpreter interview provisions can be found in two parallel sets of regulations: Regulations under the authority of DHS are contained in 8 CFR part 208; and regulations under the authority of the Department of Justice (DOJ) are contained in 8 CFR part 1208. Each set of regulations contains substantially similar provisions regarding asylum interview processes, and each articulates the interpreter requirement for interviews before an asylum officer. *Compare* 8 CFR 208.9(g), *with* 8 CFR 1208.9(g). This temporary final rule and its extensions revise only the DHS regulations at 8 CFR 208.9. Notwithstanding the language of the parallel DOJ regulations in 8 CFR 1208.9, as of the effective date of this action, the revised language of 8 CFR 208.9(h) is binding on DHS and its adjudications for 180 days. DHS is not bound by the DOJ regulation at 8 CFR 1208.9(g).

Additionally, this extension of this temporary final rule provides additional time following the expiration of the national and public health emergencies to allow USCIS to properly operationalize the return to the requirement that asylum applicants provide interpreters at their asylum interviews while also giving sufficient notice to the public of the expiration of this temporary final rule and reversion to past practice. For 180 days following publication of this temporary final rule, DHS will continue to require non-English speaking asylum applicants appearing before USCIS to proceed with the asylum interview using USCIS' interpreter services if they are fluent in one of the 47 languages as discussed in the temporary final rule at 85 FR at 59657.²¹

Additionally, as provided in 8 CFR 208.9(h)(1)(i), DHS will continue to allow, in USCIS' discretion, an applicant for asylum to provide an interpreter when a USCIS interpreter is unavailable. The reasons for this are in large part due to the increase in the affirmative asylum caseload that USCIS has experienced during the COVID-19 pandemic. That, in turn, has created challenges in accommodating the interpretation needs of asylum applicants while balancing workplace health and safety concerns. In order to best serve applicants while keeping employees and the public safe, USCIS has set limits on the number of people allowed in each individual interview space, inclusive of the asylum officer. Requiring applicants to use USCIS contract interpreters assists the agency in adhering to evolving COVID-19 health and safety standards. While USCIS continues to increase scheduling of affirmative asylum interviews, surges in other case types have also required USCIS to divert contract interpreter resources away from affirmative asylum. For this reason, allowing USCIS the continued discretion to permit an applicant to bring their own interpreter to the asylum interview assists the agency in balancing needs. These ongoing challenges require USCIS to keep the interpreter procedures in place for an additional 180 days.

²¹ DHS notes that this extension does not modify 8 CFR 208.9(g); rather the extension of the temporary final rule is written so that asylum interviews occurring while the temporary final rule is effective will be bound by the requirements at 8 CFR 208.9(h).

In these circumstances, if a USCIS interpreter is unavailable, USCIS will either reschedule the interview and attribute the interview delay to USCIS for the purposes of employment authorization pursuant to 8 CFR 208.7, or USCIS may, in its discretion, allow the applicant to provide an interpreter.²² The interpreter will be required to follow USCIS COVID-19 protocols in place at the time of the interview.

Once this temporary final rule is no longer in effect, asylum applicants unable to proceed in English with an affirmative asylum interview based on a Form I-589, Application for Asylum and for Withholding of Removal, before a USCIS asylum officer will be required to provide their own interpreters under 8 CFR 208.9(g).

Given the unique nature of the pandemic and the multiple challenges it has presented in the context of USCIS operations, the agency has had to modify its policies and procedures to adapt. Through the original temporary final rule and the first, second and third extensions, USCIS has and continues to adapt and modify its procedures to keep the workforce and public safe while also striving to serve its customers.²³ Outside of this rule, USCIS has adapted to the pandemic by developing automatic workflows for conducting interviews and completing the adjudication, and by monitoring language trends and interpreter availability.

DHS noted in the original temporary final rule and prior extensions that it would evaluate the public health concerns and resource allocations to determine whether to extend the rule. DHS has determined that extending this temporary final rule is necessary for public safety. Accordingly, DHS is extending this temporary final rule for 180 days for a fourth time through the anticipated end of the national and public health emergencies. This temporary final rule continues to apply to all affirmative asylum interviews conducted by USCIS across the nation. USCIS has determined that an extension of 180 days is appropriate given present conditions:

²² 8 CFR 208.9(h)(1)(i).

²³ USCIS Response to COVID-19 (updated Oct. 24, 2022), <https://www.uscis.gov/about-us/uscis-response-to-covid-19> (last visited Jan. 12, 2023).

emergency declarations remain in effect and there were 3,950 average daily new hospital admissions of patients with confirmed COVID-19 from January 24, 2023, to January 30, 2023.²⁴ The extension of 180 days will also permit time beyond the anticipated end of the emergency declarations on May 11, 2023, to allow USCIS to properly operationalize the return to the requirement that asylum applicants provide interpreters at their asylum interviews while also giving sufficient notice to the public of the expiration of this temporary final rule and reversion to past practice.

USCIS first published this temporary final rule on September 23, 2020, and subsequently found it necessary to publish three extensions to continue its mitigation efforts because of the ongoing pandemic.²⁵ The initial temporary final rule, the first, and the second extensions each had an effective period of 180 days, with the third extension having an effective period of 365 days, resulting in this temporary final rule being in effect for 905 days thus far.²⁶ Compared to the third extension, current CDC data supports this shorter extension of the temporary final rule, as it demonstrates that while the pandemic is ongoing, new infection and hospitalization rates continue to decrease throughout the United States.²⁷ Considering the period of time that the pandemic has been ongoing, the number of times USCIS has had to extend this temporary final rule, the extension of the emergency declarations to May 11, 2023, and USCIS' operational needs to provide sufficient notice to the public regarding the return to the requirement for applicants to provide their own interpreter, USCIS has determined that an additional extension of 180 days will continue to serve the needs of the public and the agency. Extending this temporary final rule for 180 days will provide the public and USCIS with greater certainty and

²⁴ *Id.*; CDC, COVID Data Tracker: New Admissions of Patients with Confirmed COVID-19 Per 100,000 Population by Age Group, United States (updated Feb. 1, 2023), <https://covid.cdc.gov/covid-data-tracker/#new-hospital-admissions> (last visited Feb. 2, 2023).

²⁵ *See* 85 FR 59655 (Sept. 23, 2020); 86 FR 15072 (Mar. 22, 2021); 86 FR 51781 (Sept. 17, 2021); 87 FR 14757 (Mar. 16, 2022).

²⁶ *Id.*

²⁷ *Id.*

predictability about how long these mitigation efforts will remain in place. That is, with the additional time, the agency can proactively plan ahead and focus on providing consistent services to asylum applicants rather than expending limited resources frequently changing procedures and re-issuing guidance to staff and the public.

Recognizing that the circumstances of COVID-19 continue to evolve, DHS continues to constantly evaluate the public health concerns and its mitigation efforts. As conditions improve and the health concerns posed by COVID-19 continue to ease during the time period of this fourth extension of the temporary final rule, DHS will use the remaining time following the end of the declared COVID-19 emergencies to operationalize a return to the prior practice of applicants providing their own interpreter at their asylum interview while also ensuring the public is aware of this change. USCIS recognizes that for many applicants, hiring an interpreter for the asylum interview may be a costly expense and often requires travel and early scheduling. By extending the temporary final rule beyond the expiration of the national and public health emergencies, USCIS aims to provide the public with enough time to make necessary interpreter arrangements for an asylum interview if their interview is scheduled after the expiration of this temporary final rule. During this time, USCIS will analyze the practice of USCIS providing contract interpreters at affirmative asylum interviews to determine whether there may be a future need for USCIS to provide contract interpreters and in which circumstances this would be most beneficial to the government and the public. USCIS will also use the time after expiration of the national and public health emergencies to operationalize the changes. Given the significant length of time that USCIS has required applicants to use contracted interpreters under the previous iterations of the temporary final rule, USCIS believes this additional time for the winding down of operations is necessary to provide the public adequate notice of the return to previous practice. In order to operationalize these changes, USCIS will provide notice to the public by updating the USCIS website and modifying interview notices and any other related correspondence sent to applicants and attorneys. USCIS will notify field office staff of the

reversion to prior practice by providing updated guidance, sending internal communications with updated messaging to the asylum offices, and modifying existing procedures. USCIS will also conduct outreach to stakeholders, including nonprofits, legal representatives, and community organizations, to ensure that asylum applicants are aware of the reversion to prior practice as early as possible. USCIS recognizes that for many applicants, hiring an interpreter for the asylum interview may be a costly expense and often requires travel and early scheduling, especially where the applicant speaks a less common language. A winddown period past the end of the emergency declarations will allow asylum applicants and representatives time to prepare, make alternate arrangements, and gather the necessary funds to pay for interpreter services. The winddown period will consequently help reduce the likelihood of interview reschedules when an applicant is unable to bring their own interpreter, and thus also minimize the potential impact on an applicant's eligibility for employment authorization. This is because the reversion to prior practice will require that when the applicant does not provide their own interpreter, the interview delay is attributed to the applicant for purposes of employment authorization under 8 C.F.R. 208.7. Interview delays attributed to the applicant slow the time before the applicant is eligible to apply for work authorization. By extending the temporary final rule beyond the end of the national emergencies, USCIS can facilitate an orderly and efficient return to prior practice and alleviate the burden these changes may place on applicants and contracted interpreter services.

IV. Regulatory Requirements

A. Administrative Procedure Act (APA)

DHS is issuing this extension as a temporary final rule pursuant to the APA's "good cause" exception. DHS may forgo notice-and-comment rulemaking and a delayed effective date because the APA provides an exception from those requirements when an agency "for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. 553(b)(B); *see* 5 U.S.C. 553(d)(3).

The good cause exception for forgoing notice-and-comment rulemaking “excuses notice and comment in emergency situations, or where delay could result in serious harm.” *Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004); see *Util. Solid Waste Activities Group v. E.P.A.*, 236 F.3d 749, 7554 (D.C. Cir. 2001) (exception applies when an agency finds that due and timely execution of its functions would be impeded by the notice otherwise required . . . , as when a safety investigation shows that a new safety rule must be put in place immediately” (quotation marks and alterations omitted)). This is such a situation, with the prior extension of this temporary final rule set to expire in March 2023.

As of February 1, 2023, there have been over 753 million confirmed cases of COVID-19 identified globally, resulting in more than 6.8 million deaths.²⁸ Approximately 100,941,827 cases have been identified in the United States, with about 287,580 new cases identified during the week of January 23, 2023, and approximately 1,097,246 reported deaths due to the disease.²⁹ Additionally, CDC is monitoring several variants of the virus that causes COVID-19.³⁰ Evidence suggests that some variants may spread faster and more easily than others and at least one variant may be associated with an increased risk of severe illness.³¹ In January 2023, CDC most recently highlighted Omicron subvariant XBB.1.5, which is highly transmissible and now accounts for 61.3 percent of new COVID-19 cases in the United States.³² Although vaccines are widely accessible, there is wide disparity in the percentages of who have received updated boosters.³³ Indeed, ongoing research demonstrates that while there is high effectiveness of

²⁸ WHO Coronavirus (COVID-19) Dashboard (updated Feb. 01, 2023), <https://covid19.who.int/> (last visited Feb. 1, 2023).

²⁹ *Id.*

³⁰ CDC, SARS-CoV-2 Variant Classifications and Definitions (updated Apr. 26, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/variants/variant-classifications.html> (last visited Jan. 12, 2023).

³¹ CDC, What You Need to Know About Variants (updated Aug. 11, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/variants/variant.html> (last visited Jan. 12, 2023).

³² CDC, COVID Data Tracker-Variant Proportions (updated Jan. 28, 2023), <https://covid.cdc.gov/covid-data-tracker/#variant-proportions> (last visited Feb. 1, 2023); Aliza Rozen, What You Need to Know About XBB.1.5, the Latest Omicron Variant.

³³ CDC, COVID Data Tracker – COVID-19 Vaccinations in the United States (updated Jan. 26, 2023), https://covid.cdc.gov/covid-data-tracker/#vaccinations_vacc-total-admin-rate-total (last visited Feb. 1, 2023).

approved vaccines among eligible individuals, individuals completing the primary series alone continue to experience breakthrough COVID-19 infections and may be either symptomatic or asymptomatic.³⁴ CDC reports also show that individuals who are unvaccinated have a greater risk of testing positive for COVID-19 and a greater risk of dying from COVID-19 than individuals who are fully vaccinated.³⁵

As of January 24, 2023, USCIS had 697,290 asylum applications pending final adjudication. The vast majority of these pending applications are awaiting an interview by an asylum officer. The USCIS backlog will continue to increase at a faster pace if USCIS is unable to safely and efficiently conduct asylum interviews.³⁶

Upon the Administration's January 2023 announcement of its plan to extend the emergency declarations through May 11, 2023, it became clear to USCIS that another extension of this temporary final rule, which otherwise would expire in March 2023, would be warranted. However, that did not leave DHS with sufficient time to provide notice and receive comment before the expiration of the third extension of this rule. DHS is thus publishing this fourth extension as a temporary final rule. As discussed more thoroughly above, given the continuing national emergency caused by COVID-19, and the extension of the emergency declarations through May 11, 2023, there are still urgent and compelling reasons to extend and continue this temporary final rule. The temporary final rule is limited in application to only those asylum applicants who cannot proceed with the interview in English and narrowly tailored to mitigate the spread of COVID-19. Extending the temporary final rule will allow USCIS to better manage

³⁴ CDC, The Possibility of COVID-19 after Vaccination: Breakthrough Infections (updated June 23, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/effectiveness/why-measure-effectiveness/breakthrough-cases.html> (last visited Jan. 12, 2023).

³⁵ CDC, Rate of COVID-19 Cases and Deaths by Vaccination Status, <https://covid.cdc.gov/covid-data-tracker/#rates-by-vaccine-status> (last visited Jan. 12, 2023).

³⁶ DHS recognizes that the backlog has increased since the original temporary final rule was extended; however, if all applicants were required to bring their own interpreter as was done pre-COVID-19, the interpreter may have to sit in a separate office during the interview to mitigate potential COVID-19 exposure, thereby reducing available office space to schedule additional interviews in a safe manner. This would likely increase the backlog at a faster rate than under this rule.

how many people attend asylum interviews and the precautions used during those interviews, thereby reducing the likelihood of COVID-19 transmission and protecting the health and safety of USCIS employees and asylum applicants. To not extend this measure could cause serious detriment to public safety and health.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires an agency to prepare and make available to the public a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small governmental jurisdictions). A regulatory flexibility analysis is not required when a rule is exempt from notice-and-comment rulemaking.

C. Unfunded Mandates Reform Act of 1995

This temporary final rule extension will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

D. Small Business Regulatory Enforcement Fairness Act of 1996

OMB's Office of Information and Regulatory Affairs has determined that this action is not a major rule as defined by Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (also known as the Congressional Review Act). 5 U.S.C. 804(2). This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

E. Executive Order 12866 and Executive Order 13563

Executive Orders (E.O.) 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches

that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. This rule is designated a significant regulatory action under E.O. 12866. Accordingly, the Office of Management and Budget (OMB) has reviewed this regulation. DHS, however, is proceeding under the emergency provision of Executive Order 12866 Section 6(a)(3)(D) based on the need to move expeditiously during the current public health emergency which has been extended past the expiration of the third temporary final rule extension until May 11, 2023.

This action will continue to help asylum applicants proceed with their interviews in a safe manner, while protecting agency staff throughout the next year or until the health concerns posed by COVID-19 are resolved. As a result of the temporary final rule and subsequent extensions, USCIS conducted 32,012 total asylum interviews between September 23, 2020 and March 7, 2022 and an additional 27,405 asylum interviews between March 7, 2022 and January 24, 2023. This fourth extension is not expected to result in any additional costs to the government. In addition, even with the provision that permits, at USCIS' discretion, an applicant for asylum to provide an interpreter when a contract interpreter is unavailable, there are no additional costs to the applicant relative to what would be the requirements if the temporary final rule were not extended. In those limited circumstances, the interpreter will still be required to follow USCIS COVID-19 protocols in place at the time of the interview. Following those COVID-19 protocols will not result in any additional costs for either the applicant or the interpreter.

Such contract interpreters will continue to be provided at no cost to the applicant. USCIS has an existing contract to provide telephonic interpretation and monitoring in interviews for all of its case types. USCIS has provided contract monitors for many years at interviews where the applicant brings an interpreter. In other words, almost all interviews that utilize a USCIS provided interpreter under this temporary final rule would have required instead a contracted monitor during asylum interviews conducted pre-pandemic. Additionally, the cost of monitoring

and interpretation are identical under the current contract and monitors are no longer needed for interviews conducted through a USCIS-provided contract interpreter. Therefore, the continued extension of the temporary final rule is projected to be cost neutral or negligible for the government because USCIS is already paying for these services even without this rule.

In the limited circumstances where a contract interpreter is unavailable, USCIS will either reschedule the interview and attribute the interview delay to USCIS for the purposes of employment authorization pursuant to 8 CFR 208.7, or USCIS may, in its discretion, allow the applicant to provide an interpreter.³⁷ In such cases, the applicant would be in the same position they would have been without this action.

DHS recognizes there are both quantitative and qualitative benefits that could be realized by providing an applicant for asylum the opportunity to bring their own interpreter when a contract interpreter is unavailable, such as the costs avoided that would otherwise be incurred due to rescheduling if a contract interpreter is unavailable – both for the applicant and USCIS – and the overall positive effect on applicants of having their asylum application timely adjudicated. Once this rule is no longer in effect, asylum applicants unable to proceed with an affirmative asylum interview before a USCIS asylum officer in English will again be required to provide their own interpreters under 8 CFR 208.9(g). By extending the temporary final rule beyond the end of the national emergencies, USCIS can facilitate an orderly and efficient return to prior practice and alleviate the burden these changes may place on applicants, contracted interpreter services, and USCIS offices scheduling affirmative asylum interviews.

F. Executive Order 13132 (Federalism)

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive

³⁷ 8 CFR 208.9(h)(1)(i).

Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

G. Executive Order 12988 (Civil Justice Reform)

This rule meets the applicable standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988.

H. Paperwork Reduction Act

This rule does not propose new, or revisions to existing, “collection[s] of information” as that term is defined under the Paperwork Reduction Act of 1995, Public Law 104-13, 44 U.S.C. chapter 35, and its implementing regulations, 5 CFR part 1320. As this would only span 180 days, USCIS does not anticipate a need to update the Form I-589, Application for Asylum and for Withholding of Removal, despite the existing language on the form instructions regarding interpreters. USCIS will continue to post updates on its Form I-589 website, <https://www.uscis.gov/i-589>, and other asylum and relevant webpages regarding the interview requirements in this regulation, as well as provide personal notice to applicants via the interview notices issued to applicants prior to their interview.

List of Subjects in 8 CFR Part 208

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

Accordingly, for the reasons set forth in the preamble, the Secretary of Homeland Security amends 8 CFR part 208 as follows:

PART 208 – PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

1. The authority citation for part 208 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1158, 1226, 1252, 1282; Title VII of Pub. L. 110-229; 8 CFR part 2; Pub. L. 115-218.

2. Effective from March 16, 2023 through September 12, 2023, amend § 208.9 by revising paragraph (h) introductory text to read as follows:

§208.9 Procedure for interview before an asylum officer.

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(h) *Asylum applicant interpreters*. For asylum interviews conducted between March 16, 2023, through September 12, 2023:

* * * * *

Alejandro Mayorkas,
Secretary,
U.S. Department of Homeland Security.

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